

1 **C. The Advocacy Team Cannot Prove That PSI's Perchlorate Has Affected**
2 **Any Water Supply Wells**

3 The Advocacy Team seeks a replacement water order against PSI in this proceeding
4 (Draft CAO, ¶¶ 64-66.) In order to prevail on this claim, the Advocacy Team must first
5 prove the threshold requirements set forth in Section 13304(a). As discussed in Section
6 IV.A and IV.B of this Brief, the Advocacy Team cannot meet these requirements, so there is
7 no basis for a replacement water order against PSI.

8 In order to prevail on the replacement water claim, the Advocacy Team must also
9 prove by a preponderance of evidence that a discharge of perchlorate by PSI has "affected"
10 each water supply well for which replacement water is sought. Section 13304(a); July 13,
11 2004 email from the Regional Board Executive Officer Gerard Thibeault to the Regional
12 Board. (Exhibit P128.) The Advocacy Team has no evidence of perchlorate discharged by
13 PSI reaching groundwater, so it cannot possibly prove a single water supply well has been
14 "affected" by perchlorate from PSI. In fact, the Advocacy Team admits that:

- 15 • No Fontana well is affected by contamination from the 160-Acre Property. All
16 of the Fontana wells shown on PSI Exhibit P139 (F-18A, F-04A, F-25A, F-
17 36A, F-03A and F15B) are on the southwest side of the Rialto-Colton Fault.
18 These Fontana wells are not affected by any contamination from the 160-Acre
19 Property. (Sturdivant Depo., Vol. 1, March 20, 2007, 81:2 - 82:2.)
- 20 • All the City of Colton and lower Rialto-Colton Basin West Valley Water District
21 wells probably are contaminated as a result of the use of Chilean nitrate in
22 agricultural operations that did not take place on the 160-Acre Property.
23 (Holub Depo., March 8, 2007 Vol. 1, 129:19-131:12.)
- 24 • There is no evidence to prove that contamination in any well in the Rialto-
25 Colton Basin results from any of the alleged dischargers, including PSI.
26 Robert Holub, the Advocacy Team's most knowledgeable witness on Chilean
27 nitrate has not concluded that any of the wells listed in Paragraph 55 of the
28 Draft CAO were not contaminated by the use of fertilizer in the basin. (Holub

Depo., Vol. 1, March 8, 2007, 132:15-22.) Further, Mr Holub testified he cannot tell with respect to any well located in the Rialto-Colton basin that has shown concentrations of perchlorate, whether that perchlorate comes from any particular operation. (Holub Depo., Vol. 4, April 9, 2007, 933:8-13.)

The Advocacy Team:

- Does not know where the low concentrations of perchlorate in PW-6 come from – whether they are coming from the Mid Valley Landfill, from the 160-Acre Property or somewhere else. (Holub Depo., Vol. 4, April 9, 2007, 1055:20 - 1056:12.)
- Does not know whether Rialto-2 has impacted the direction of flow from the Mid Valley Landfill towards PW-5. (Holub Depo., Vol. 4, April 9, 2007, 1059:3-23.)
- Cannot link the perchlorate in any of the wells to any particular operation. (Holub Depo., Vol. 4, April 9, 2007, 933:19 - 934:20.)

In fact, according to sworn testimony by Advocacy Team witnesses, there is no data to indicate that PW-2 has perchlorate coming from PSI, Goodrich or West Coast Loading. The same is true for every single well on the map included on Exhibit 4256. (PSI Exhibit P 139.) (Holub Depo., Vol. 4, April 9, 2007, 934:21 - 935:15.) There is no basis for a water replacement order against PSI.

V. NO EVIDENCE EXISTS TO SUPPORT THE CLAIMS IN THE DRAFT CAO AGAINST PSI

Pursuant to the Advocacy Team's February 27, 2007 letter, the October 27, 2006 Draft CAO serves as the operative pleading against PSI. The allegations in the Draft CAO are false and totally without merit. PSI takes this opportunity to refute some of the most unsubstantiated allegations against it in the Draft CAO. This is by no means an all-inclusive list that PSI might be able to provide if: (1) PSI had been provided the Advocacy Team's evidence on time; (2) PSI had been given the Advocacy Team's evidence in an

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1 understandable form; and, (3) Advocacy Team witnesses had been forthcoming in
2 deposition testimony.

3 The Advocacy Team repeatedly alleges PSI operated on 47 acres on the 160-Acre
4 Property. (Draft CAO, ¶¶ 37, 39 and 42.) The Advocacy Team knows PSI operated in the
5 160-Acre Property on only 25 acres, as evidenced by numerous documents, including the
6 March 5, 2004 and April 8, 2004 letters signed by Advocacy Team member Gerard
7 Thibeault, the Regional Board's Executive Officer. (Exhibits P12 and P13 .)

8 The Advocacy Team alleges that PSI's operations on the 160-Acre Property included
9 "assembling fireworks assortment packages." (Draft CAO, ¶ 36.) This allegation
10 erroneously implies PSI manufactured and assembled consumer fireworks. Even the
11 Advocacy Team's own evidence contradicts its allegation. Exhibit 1 in the Advocacy
12 Team's Supplementary Evidence Binder correctly states:

13 Pyro Spectaculars is a public display fireworks operator, fireworks
14 importer/exporter, and fireworks wholesaler (Pyro Spectaculars, 2003). Pyro
15 Spectaculars purchases and imports finished fireworks, stores them in
16 approved facilities, and repackages them for displays and other professional,
17 licensed users.

18 (Advocacy Team's Supplementary Evidence, Exhibit 1 at 49.)

19 The Advocacy Team alleges, after inaccurately stating what PSI does, that PSI
20 "continues many of these same activities at the site today." (Draft CAO, ¶ 36.) The obvious
21 implication is that PSI is discharging perchlorate now. The Advocacy Team knows full well
22 PSI is not discharging perchlorate in any manner whatsoever. Advocacy Team member
23 Kurt Berchtold, Assistant Executive Director of the Regional Board, recently made this point
24 clear to Davin Diaz of CCAEJ in an e-mail dated September 1, 2006. (Exhibit P1.) The e-
25 mail from Advocacy Team member Berchtold states: "Pyro Spectaculars is not discharging
26 perchlorate."

27 The Advocacy Team alleges that fires and explosions on the 160-Acre Property
28 resulted in the release of PSI's perchlorate to soil and groundwater. (Draft CAO, ¶¶ 38, 41.)

1 There is no evidence that perchlorate from these events, if any, was discharged to
2 groundwater or is a threat to discharge to groundwater. The Advocacy Team has no soil or
3 groundwater sampling data to indicate any perchlorate contamination resulted from these
4 events. As discussed in detail in Section IV.A of this Brief, the Advocacy Team witnesses
5 admit they have no evidence of how much of PSI's perchlorate, if any, was discharged to
6 groundwater or is a threat to discharge to groundwater.

7 In its Memorandum of Points and Authorities, the Advocacy Team focuses on a
8 tragic accidental explosion and resultant fire on September 9, 1996 that started in a 45-foot
9 trailer parked at the PSI loading dock and warehouse. (Advocacy Team Brief, pp. 81-82.)
10 The Advocacy Team has no evidence of how much perchlorate was involved. The
11 Advocacy Team has no soil samples to support its position. The Advocacy Team claims
12 the entire inventory of the warehouse was lost and speculates that water extinguished the
13 fire before all perchlorate would have burned. (Advocacy Team Brief, p. 82.) However, the
14 actual evidence, the Hazardous Materials Response Report dated September 9, 1996
15 relied on in the Advocacy Team's evidence, is to the contrary. The Hazardous Materials
16 Response Report states that "all elements of the explosion were consumed in the fire" and
17 "the fire was contained to two sections of a four section building." (Advocacy Team, Exhibit
18 27 at 10079.)

19 The Advocacy Team attempts to bolster its speculation by relying on a 2004 report
20 by Rialto's consultant, TRC, that took surficial samples of soil and ash following a fire in an
21 Astro Pyrotechnics' building on Stonehurst Avenue, not on the 160-Acre Property.
22 (Advocacy Team Brief, p. 82.) The building was a research and development building and
23 contained raw perchlorate. (Advocacy Team Exhibit 6, at p. 3.) Raw perchlorate was not
24 used by PSI on the 160-Acre Property. (Advocacy Team's Supplementary Evidence,
25 Exhibit 1 at 50.) Accordingly, the TRC data cannot be used to reach any conclusions about
26 what could possibly be left after a fire on the 160-Acre Property. The TRC report is silent
27 on how the perchlorate detected in surficial soil and ash could travel through the sub-
28 surface materials to groundwater approximately 400 feet below. As the Advocacy Team

1 and Rialto are aware, all contaminated soil and ash from the 2004 Astro Pyrotechnics fire
2 was cleaned up. Accordingly, using the TRC report for a different fire or explosion has no
3 evidentiary value.

4 That the TRC report has no evidentiary value for the 160-Acre Property is further
5 proved by statements from Rialto's expert witness Daniel B. Stephens. Daniel B. Stephens
6 estimates perchlorate released to the soil will take 320 years ($400 \text{ feet} \div 1.25 \text{ feet/year} =$
7 320 years) to reach groundwater, absent a source of water other than rainfall, to mobilize
8 the perchlorate. ("Declaration of Daniel B. Stephens" submitted by Rialto on April 12, 2007,
9 p. 14.) Any minimal amount of perchlorate remaining on the ground at the 160-Acre
10 Property (or elsewhere in the Rialto-Colton Basin) does not meet the definition of "threaten"
11 in Water Code Section 13304 because that section requires a "condition creating a
12 substantial probability of harm, when the probability and potential extent of harm make it
13 reasonably necessary to take immediate action to prevent, reduce, or mitigate damages to
14 persons, property, or natural resources." If Rialto's expert is to be believed, there is a
15 minimum of hundreds of years before any threat requires immediate action.

16 The Advocacy Team alleges that PSI burned "pyrotechnic waste" that resulted in
17 unburned perchlorate that was somehow mobilized to groundwater. (Draft CAO, ¶¶ 39, 40,
18 42, 48, 49.) Once again, the Advocacy Team has no evidence to support this allegation.
19 For example, Ann Sturdivant, the primary drafter of the Draft CAO, testified with respect to
20 the allegations in paragraph 40 of the Draft CAO:

21 Q. In the next paragraph there's reference to a specific volume it says permits were also
22 issued to Pyro Spectaculars in 1988 for burning of 400 to 700 pounds of pyrotechnic
23 waste at their Locust Avenue address in Rialto. Have I read that correctly?

24 A. In the middle of finding 40 is that where we are?

25 Q. Yes.

26 A. I believe so, yes. Found it.

27 Q. Now, how much of the 400 to 700 pounds in that sentence is hazardous waste?

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1 A. I don't know. I'd have to look at the document. It may say hazardous waste on it. I
2 don't know.

3 Q. How much of that 400 to 700 pounds referenced in that sentence was perchlorate?

4 A. I don't know.

5 Q. After the burn referenced in that sentence, how much perchlorate was left?

6 A. I don't know.

7 Q. There's also reference to a volume in the last sentence of that paragraph where it
8 says a permit was also issued to Pyro Spectaculars in 1999 for burning 500 pounds
9 of pyrotechnic waste over a one month period have I read that correctly?

10 A. Yes.

11 Q. How much of the 500 pounds referenced in that sentence was hazardous waste?

12 A. I'd have to look at the document. It -- it may say on there.

13 Q. How much of it was perchlorate?

14 A. I don't know.

15 Q. How much of the 500 pounds if it was burned how much perchlorate was left after
16 the burn?

17 A. I don't know.

18 Q. Is there any way to tell at this point?

19 A. I don't know of a way.

20 (Sturdivant Depo., Vol. 1, March 20, 2007, 177:16-179:2.)

21 Again Ms. Sturdivant admitted the Advocacy Team has no evidence of how much of
22 PSI's perchlorate was in its waste:

23 Q. The last sentence of paragraph 42 says the waste placed in the burn pits by Pyro
24 Spectaculars would have contained perchlorate. Have I read that right?

25 A. Yes.

26 Q. How much perchlorate?

27 A. --

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1 Q. Well, how much perchlorate was in the waste that you reference in that sentence that
2 I read a minute ago?

3 A. The waste placed in the burn pits?

4 Q. Yes.

5 A. I don't know.

6 (Sturdivant Depo., Vol. 1, March 20, 2007, 179:25-180:13.)

7 Ms. Sturdivant testified that her understanding was that some of PSI's waste
8 included:

9 a. Fireworks containing "various chemicals including perchlorate salts."

10 (Sturdivant Depo., Vol. 2, March 28, 2007, 12:3-15.)

11 b. Fuse. (Sturdivant Depo., Vol. 2, March 28, 2007, 12:16-18.) Fuse does not
12 contain perchlorate and it is made using black powder. (Sturdivant Depo.,
13 Vol. 1, March 20, 2007, 141:25-142:4.)

14 c. Black powder. (Sturdivant Depo., Vol. 2, March 28, 2007, 12:19-21.) Black
15 powder does not contain perchlorate. (Sturdivant Depo., Vol. 1, March 20,
16 2007, 142:5-7.)

17 d. Paper. (Sturdivant Depo., Vol. 2, March 28, 2007, 12:22-24.)

18 e. Cardboard. (Sturdivant Depo., Vol. 2, March 28, 2007, 12:24-13:1.)

19 The Advocacy Team has no idea whatsoever how much of PSI's waste contained
20 perchlorate. (Sturdivant Depo., Vol. 2, March 28, 2007, 14:3-9; Saremi Depo., Vol. 2,
21 March 23, 2007, 374:13-16; Saremi Depo., Vol. 3, March 27, 2007, 726:12-16; Holub
22 Depo., Vol. 1, March 8, 2007, 181:20-24.)

23 The Advocacy Team alleges that PSI used the McLaughlin Pit as a disposal pit for
24 perchlorate waste from 1979 until 1986. (Draft CAO, ¶¶ 43-44.) The Advocacy Team has
25 no evidence to support this allegation. The Regional Board's own file shows that the
26 McLaughlin pit was no longer in use after about June of 1983 (Exhibit P27 at PSI 3000317

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1 and P64 at PSI 3000511)⁵ and that all PSI placed in the McLaughlin Pit were a limited
2 number of aerial shells. (Advocacy Team Exhibit 30 at AP455.) The very small number of
3 duds were temporarily placed in "the McLaughlin Pit" to soak, were then removed and
4 disposed of elsewhere, via burning pursuant to duly authorized permits issued by Rialto Fire
5 Department. (Souza Decl., ¶ 24.) Ms. Sturdivant reluctantly testified the Advocacy Team
6 had information from the 2005 Kleinfelder report (Exhibit P15 at PSI 3000121) that the dud
7 shells were removed:

8 Q. . . . See where it says "Pyro Spectaculars occasionally placed a very limited number
9 of defective shells in the McLaughlin pit for softening the hard outer cardboard shell.
10 These softened shells were then removed from the McLaughlin pit and taken back to
11 the Pyro Spectaculars' facility where they were opened." Do you see that?

12 A. I see it.

13 Q. Okay. So do you have any information to suggest that the information in here about
14 the shells being removed is incorrect?

15 A. I know this is what Kleinfelder said I don't have an opinion about it.

16 Q. Well, did you try to figure out whether what Kleinfelder said was right?

17 A. I don't understand that question.

18 Q. Did you try to figure out what Kleinfelder was telling you was correct?

19 A. I don't know.

20 Q. Who would know on staff?

21 A. I don't know who would have tried to figure out what a consultant said about a topic.

22 Q. Well, here's what I don't understand. The McLaughlin pit was a focus of your
23 investigation; right?

24 A. Of this investigation that Kleinfelder did, yes.

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27 ⁵As set forth above, this information comes from a January 24, 1985 Regional Board
28 inspection report for Apollo. Bruce Paine of the Regional Board Staff memorialized a
conversation with Pedro Mergil of Apollo. Mr. Paine recorded that Mr. Mergil said Apollo
had not used the pond for 18 months or approximately until June 1983.

1 Q. Yes.
2 But wasn't it also a focus of the investigation of the regional board in connection with
3 the Rialto-Colton-Fontana perchlorate?
4 A. It was one area of interest yes.
5 Q. And wasn't it of interest to the regional board what was going into that McLaughlin
6 pit?
7 A. Yes.
8 Q. So wouldn't it be of interest to the regional board to try to figure out whether a
9 consultant who was telling you something about what was going into the McLaughlin
10 pit or coming out of the McLaughlin pit was accurate or not?
11 A. I believe that the assumption would generally have been that a consultant who has a
12 license and registration would do their best to state fact –
13 Q. Okay.
14 A. – and we generally assume that.
15 Q. I understand.
16 So what you're saying is you have a tendency to want to trust what's in a consultant's
17 report because there's fear if it's wrong they could lose their license?
18 A. I think that's fair.
19 Q. Okay. So you'd have a tendency then to believe Kleinfelder when they said that
20 aerial shells were taken out of the McLaughlin pit; right?
21 A. I believe so.
22 Q. Okay. You don't have any reason to think that that was wrong do you?
23 A. I don't know.
24 Q. Well you don't have any evidence that it was wrong, do you?
25 A. I don't know one way or the other.
26 (Sturdivant Depo., Vol. 2, March 28, 2007, 232:5-234:18.)
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1 The Advocacy Team admits it:

- 2 • Does not know how many aerial shells over time PSI may have placed in the
3 McLaughlin Pit. (Sturdivant Depo., Vol. 1, March 20, 2007, 146:23-25; Saremi
4 Depo., Vol. 3, March 27, 2007, 712:11-15.)
- 5 • Does not know how much pyrotechnic composition is in an aerial shell.
6 (Sturdivant Depo., Vol. 1, March 20, 2007, 146:14 - 146:19.)
- 7 • Does not know how much perchlorate is in any individual aerial shell.
8 (Sturdivant Depo., Vol. 1, March 20, 2007, 146:20-22; Saremi Depo., Vol. 3,
9 March 27, 2007, 712:22 - 713:1.)
- 10 • Does not know how much perchlorate from the aerial shells was in the
11 McLaughlin Pit. (Saremi Depo., Vol. 3, March 27, 2007, 713:3-9.)
- 12 • Does not know how much, if any, perchlorate got out of aerial shells from Pyro
13 Spectaculars and into the McLaughlin Pit. (Sturdivant Depo., Vol. 1, March
14 20, 2007, 149:6-9; Saremi Depo., Vol. 2, March 23, 2007, 377:13-23; Vol. 3,
15 March 27, 2007, 712:16-21.)

16 The Advocacy Team does not know how much waste, if any, Pyro Spectaculars put in the
17 McLaughlin Pit containing perchlorate. (Saremi Depo., Vol. 3, March 27, 2007, 674:25 -
18 675:3)

19 Finally, the Advocacy Team claims testing of aerial shells by PSI resulted in
20 groundwater contamination. There is no evidence that perchlorate from testing of aerial
21 shells by PSI has discharged to groundwater or is a threat to discharge to groundwater. The
22 Advocacy Team has no soil or groundwater sampling data to indicate any perchlorate
23 contamination from the testing of aerial shells by PSI. The Advocacy Team admits it has no
24 evidence of how much of PSI's perchlorate, if any, was discharged to groundwater or is a
25 threat to discharge to groundwater due to aerial testing. (Sturdivant Depo., Vol. 1, March
26 20, 2007, 183:21-23.) The Advocacy Team's untimely April 6, 2007 witness statements do
27 not identify a single witness to testify about discharges to groundwater due to testing of
28 aerial shells.

1 Assuming there actually were data to support a conclusion of contamination from
2 testing, which there is not, for the same reasons it cannot differentiate between perchlorate
3 from Apollo and allegedly from PSI at the McLaughlin Pit, the Advocacy Team would not be
4 able to differentiate between the companies that tested fireworks in the area described as
5 Fire Zone 13. In addition to PSI, Apollo tested fireworks in the area described as Fire Zone
6 13. (Hescox Depo., Vol. 1, February 14, 2005, 175:15-176:20.)

7 Lacking any site-specific data to support its claim, the Advocacy Team relies on the
8 Massachusetts DEP draft report 2005 for the proposition that repeated fireworks displays
9 would have resulted in perchlorate being on the ground. (Advocacy Team's brief, 84.) The
10 Advocacy Team fails to mention that the average depth to groundwater in the
11 Massachusetts study averaged about 4 feet. In the 160-Acre Property, depth to
12 groundwater is approximately 400 feet, or 100 times that amount. The Advocacy Team
13 offers only speculation about how any perchlorate on the surface would be mobilized 400
14 feet to the groundwater. Possibility, speculation and conjecture are not sufficient proof,
15 even of matters that need only be proven by a preponderance of the evidence (see
16 generally Roddenberry v. Roddenberry (1996) 44 Cal.App.4th 634, 651; Regents of
17 University of California v. Public Employment Relations Bd. (1990) 220 Cal.App.3d 346,
18 359; Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 35, p. 184).

19 The Advocacy Team does not have a vadose zone model, nor any scientific basis to
20 support its unsupported assertion that the soil is "porous" so it is conducive for perchlorate
21 to "readily" move toward groundwater. For example, on page 10 of its Memorandum of
22 Points and Authorities, the Advocacy Team alleges: "Once applied to soil, perchlorate will
23 be readily transported to groundwater with any water that percolates into the soil (e.g.
24 precipitation) and travels to groundwater." (Emphasis added.) However, according to very
25 grudgingly given testimony under oath by Advocacy Team member Ann Sturdivant, "readily"
26 does not refer to speed," the statement pertains to the chemical solubility of perchlorate
27 salts," not the speed by which the perchlorate moves through the soil to the groundwater.
28 (Sturdivant Depo., Vol. 4, 1004:8-1008:10.) The Advocacy Team's attempts to imply that

1 perchlorate gets to groundwater quickly from 400 feet above are wrong and scientifically
2 dishonest.

3 The Advocacy Team's shameless claim of "readily transported" perchlorate at the
4 160-Acre Property is further refuted by Rialto's expert Daniel B. Stephens who estimates
5 perchlorate released to the soil will take 320 years (400 feet ÷ 1.25 feet/year = 320 years) to
6 reach groundwater, absent a source of water other than rainfall, to mobilize the perchlorate.
7 ("Declaration of Daniel B. Stephens" submitted by Rialto on April 12, 2007, p. 14.) Clearly,
8 the Advocacy Team wanted to create a wrong impression that perchlorate on the surface of
9 the ground on the 160-Acre Property threatens groundwater. This wrong impression has no
10 evidentiary basis and must be disregarded.

11 **VI. THE ADVOCACY TEAM IGNORES OTHER ESTABLISHED SOURCES OF**
12 **CONTAMINATION**

13 To date, there are three confirmed sources of the perchlorate in the Rialto/Colton
14 Groundwater Basin:

- 15 • A gravel washing operation involving unlined settling ponds with a storage
16 capacity of 13 million gallons of water, which the Advocacy Team knowingly
17 and negligently authorized, and Rialto negligently permitted the County of San
18 Bernardino ("County") and its tenant, Robertson's Ready Mix ("Robertson's"),
19 to locate directly over historical bunkers where materials containing
20 perchlorate had been stored and released (the "County Release");
- 21 • Releases from fireworks manufacturing by Apollo, including a Class I
22 hazardous waste disposal pit, now known as the McLaughlin Pit, located on
23 the 160-Acre Site into which the Regional Board Staff, with personal
24 involvement of members of the Advocacy Team prosecuting this case: (a)
25 negligently allowed Apollo to dump thousands of pounds of fireworks
26 manufacturing waste, including perchlorate, and flood it with tens of
27 thousands of gallons of water annually from 1972 to mid-1983 or later, which
28 was released into the groundwater in direct violation of its waste discharge

1 requirements; and (b) then, failed to perform its mandatory duty to require
2 closure of the pit as set forth in former Subchapter 15, 23 CCR § 2510 et seq.,
3 of the State Water Board's regulations (the "Apollo Releases"); and,
4 • Chilean fertilizer which contains naturally-occurring perchlorate that
5 historically was used extensively for agricultural purposes throughout the
6 basin.

7 Despite having no evidence that PSI caused any of these releases, the Advocacy
8 Team seeks an order by issuance of the Draft CAO to compel PSI to undertake to spend
9 potentially hundreds of millions of dollars to further investigate and remediate them. (Holub
10 Depo., Vol. 3, April 6, 2007, 248:23:249:2.)

11 **A. The County Release**

12 In 1999, two years after the discovery of perchlorate in the Rialto/Colton
13 Groundwater Basin, the Regional Board Staff approved a soil washing operation proposed
14 by the County's landfill. The County, through Robertson's, proposed a massive excavation
15 project which included soil washing and the installation of four unlined settling ponds, each
16 200 feet x 250 feet to 350 feet x 10 feet with a capacity of 13 million gallons. (Exhibit
17 P117.) The proposed unlined ponds were directly over areas where materials and products
18 containing perchlorate had been stored.

19 The direct causal connection between the mobilization of massive amounts of
20 perchlorate to the groundwater and the millions of gallons of water discharged to the
21 unlined ponds was admitted by Mr. Thibeault during his March 14, 2007 deposition:

22 Q. Do you have an opinion sitting here today whether or not it [the settling ponds]
23 caused perchlorate to reach the ground water underneath it?

24 A. Yes.

25 Q. And what is your opinion?

26 A. I believe that the wash water from the aggregate operation mobilized perchlorate in
27 the sub surface and pushed it down towards the groundwater.

28 (Thibeault Depo., Vol. 1, March 14, 2007, 59:24 - 60:6.)

1 At first, Mr. Thibeault denied in his deposition that the Regional Board even had any
2 jurisdiction over the settling ponds:

3 Q. And in connection with that [the permitting of the settling ponds], what investigation, if
4 any, did the regional board staff conduct prior to allowing that gravel washing
5 operation to take place?

6 A. Well, I think I testified to you that we don't - I don't think we have a permitting
7 jurisdiction. . . .

8 (Thibeault Depo, Vol. 1, March 14, 2007, 60:8-13.) When confronted with the letter
9 approving the Robertson's request for the Regional Board's approval of the unlined settling
10 ponds, Mr. Thibeault was forced to agree that on July 6, 1999, Dixie Lass of the Regional
11 Board Staff authorized the County through Robertson's to place the four ponds directly over
12 historical bunker areas where it was known that fireworks manufacturers had stored
13 materials and products containing perchlorate. He was also forced to acknowledge that
14 Dixie Lass approved Robertson's request that these ponds be unlined. (Thibeault Depo.,
15 Vol. 2, March 16, 2007, 435:1-11 and 452:22-457:20.) Dixie Lass's letter to Robertson's
16 unambiguously provided: "After careful review, we [Regional Board Staff] have determined
17 that the proposed project should not have any negative impact on water quality at the
18 landfill." (Exhibit P118.)

19 Extraordinarily, contrary to this statement, the Regional Board Staff's action was
20 taken without a public hearing, without the approval of the appointed members of the
21 Regional Board, without the imposition of any waste discharge requirements, and without
22 requiring confirmation that the soil in the bunker area underlying the proposed ponds did not
23 contain perchlorate or any other hazardous material. (Thibeault Depo., Vol. 2, March 16,
24 2007, 435-438, 452-457, 462-463.)

25 On March 14, 2001, less than two years after the Regional Board Staff authorized
26 the construction of four unlined settling ponds, the County wrote Dixie Lass a letter which

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1 advised that perchlorate was being detected in ever increasing numbers in a monitoring
2 well immediately downgradient of the unlined ponds. (Exhibit P119.) In that letter, the
3 County reported the following increasing perchlorate concentrations:

4 April 2000	1.9 ppb
5 July 2000	10 ppb
6 October 2000	51 ppb
7 January 2001	250 ppb

8 The County's letter asked for a prompt response.

9 One month later, on April 17, 2001, the County wrote to Regional Board Staff a
10 second letter which restated its concern about the "serious nature" of the rising perchlorate
11 concentrations in a monitoring well down gradient of Robertson's unlined ponds, and urged
12 prompt action:

13 The County . . . is writing this letter to advise the Regional Water Quality
14 Control Board (RWQCB) that the concentrations of perchlorate have
15 continued to rise in samples obtained from groundwater monitoring well F-6 at
16 the Mid-Valley Sanitary Landfill ("MVSL"). Retest analyses . . . confirm that
17 the concentration of perchlorate in groundwater samples obtained in January
18 2001 ranged from about 250 to 270 micrograms per liter (μ g/l). Before the
19 latest detections, perchlorate was measured at 51 μ g/l on October 2000.

20 * * *

21 The SWMD is currently arranging meetings to discuss the current conditions
22 with the aggregate processing contractor, and would like to meet with the
23 RWQCB staff as soon as possible to discuss the same subject. . . .

24 Please be assured that SWMD recognizes the serious nature of the current
25 data and is committed to investigating the source of the impacts at well F-6.

26 (Exhibit P120.)

27 More than a year later, on September 26, 2002, within days of the Regional Board's
28 order rescinding for lack of proof Mr. Thibeault's CAO R8-2002-051, which sought to place

1 all responsibility and liability for the perchlorate releases to the Rialto/Colton Groundwater
2 Basin on Kwikset and Goodrich, Mr. Thibeault ordered the County to investigate the
3 releases of perchlorate to the groundwater (then at a concentration of 800 ppb) mobilized
4 by Robertson's unlined ponds. What had remained hidden by the Regional Board Staff
5 suddenly was disclosed. Mr. Thibeault wrote:

6 The evidence indicates that the bunkers adjacent to the MVSL [Mid-Valley
7 Sanitary Landfill] were used for storing explosives, ordinance, propellant, and
8 pyrotechnic chemicals (including perchlorate salts), on property that now
9 belongs to the County. . . . In addition, gravel washing operations on county
10 property may have contributed to mobilization or spread of perchlorate.
11 Perchlorate has been detected in groundwater downgradient of the County's
12 properties (the former bunker area, and the MVSL) . . . [in] concentrations in
13 excess of 800 ppb.

14 (Exhibit P121.)

15 In January 2003, the Regional Board issued CAO R8-2003-0013 which required the
16 County to clean up the perchlorate contamination coming from its property where the
17 unlined settling ponds were located. What had been known by the Regional Board Staff
18 since at least April 2001, now was suddenly crystal clear: "it is evident that perchlorate is
19 being discharged to groundwater from property that is currently owned by the County."
20 (Exhibit P122 at Finding 12.) By January 2003, the monitoring well downgradient of the
21 settling ponds reported a concentration of 1,000 ppb of perchlorate. (Id. at Finding 9.)

22 Mr. Thibeault admitted that the Regional Board Staff's actions negligently caused the
23 County Release:

24 Q. Dixie Lass's letter of June 6, 1999 permitted . . . this settling pond operation to go
25 forward which resulted in significant quantities of perchlorate being released to the
26 groundwater; isn't that correct?

27 A. Yes.

28 ///

1 Q. And so in that sense the mistakes that were made in connection with allowing this to
2 happen . . . were the reason it happened isn't that correct?

3 [Objection] . . .

4 A. Allowed it to happen, yes.

5 * * *

6 Q. Isn't it the case Mr. Thibeault that every discharge to groundwater in your jurisdiction
7 is something of concern to the staff and the regional board itself?

8 A. Yes.

9 Q. And any proposed discharge to the groundwater requires careful investigation to
10 determine whether or not it's potentially harmful to the beneficial uses; isn't that
11 correct?

12 A. Yes.

13 Q. And that wasn't done here was it?

14 A. It wasn't careful enough.

15 (Thibeault Depo., Vol. 2, March 16, 2007, 456:24 - 457:20; 463:5-18.)

16 Coincidentally, the Advocacy Team's position that the County Release caused a
17 separate plume than releases from the 160-Acre Property would help protect the Regional
18 Board Staff and Gerard Thibeault from the disastrous decision to approve unlined ponds for
19 the County. Rialto and its consultants, which are a part of the prosecution team in this
20 proceeding, disagree and contend there is one commingled plume. (See for example
21 Exhibit P138.)

22 **B. The Apollo Releases**

23 The Regional Board Staff's mismanagement of the regulation of Apollo also caused
24 massive releases of perchlorate to the groundwater. The only confirmed source of
25 contamination from the 160-Acre Property is the McLaughlin Pit. (Saremi Depo., Vol. 1,
26 March 22, 2007, 263:19 - 264:2.) To fully understand this issue, it is necessary to go back

27 ///

28 ///

1 to the beginnings of Apollo, a large scale fireworks manufacturer that operated on the 160-
2 Acre Property and ultimately installed and used the McLaughlin Pit to dispose of its
3 fireworks manufacturing waste.

4 In 1966, Century Investments Company/Clipper Pyrotechnic Corporation (collectively
5 "Clipper") purchased the 160-Acre Property. In 1968, Clipper was merged into Apollo.
6 Between 1968 and 1987, Pyrotronics owned and operated related companies under the
7 following names: Apollo Fireworks, Atlas Fireworks, California Fireworks Display Company,
8 Red Devil Fireworks, United Fireworks, and Wild Cat Fireworks. Eventually, Apollo was
9 comprised of three operating divisions: Red Devil Fireworks, Apollo Fireworks, and
10 California Fireworks Display Company. Apollo used the northern portion of the 160-Acre
11 Property for the design, manufacture, storage and testing of both Class B aerial fireworks
12 and Class C consumer fireworks. Perchlorate was a component of Apollo's fireworks.
13 (Exhibits P22 , P24, P41, P44, and P65.)

14 Potassium perchlorate is one of the powders used during the fireworks
15 manufacturing process and was used at Apollo. (Hescox Depo., Vol. 1, Feb. 14, 2005,
16 241:20 - 242:13.) Pyrotechnic powder was accumulated during operations at Apollo. (Apel
17 Depo., Vol. 1, Aug. 29, 2005, 112:11 - 113:1.) Pyrotechnic materials were spilled in the
18 mixing rooms. (Mergil Depo., Vol. 1, May 2, 2005, 94:19 - 95:23.) In the mixing rooms,
19 spilled powder was cleaned up every two mixes. (Mergil Depo., Vol. 1, May 2, 2005,
20 96:11-22.) The rooms were swept up, watered down and squeegeed out. (Mergil Depo.,
21 Vol. 1, May 2, 2005, 97:2-10.) In the pressing rooms, at the end of the day, water was used
22 to hose out the rooms. (Hescox Depo., Vol. 1, Feb. 14, 2005, 116:3-7.) The water from the
23 hoses went onto the cement floor, out the door, over the ground and into a sump. (Hescox
24 Depo., Vol. 1, Feb. 14, 2005, 117:11-20.) Thus, pyrotechnic powders were washed out of
25 the buildings and into sump. (Apel Depo., Vol. 1, Aug. 29, 2005, 109:9 - 110:3; Mergil
26 Depo., Vol. 1, May 2, 2005, 84:12 - 85:7.)

27 There were two 1968 explosion accidents at the Rialto facility. (Hescox Depo., Vol.
28 1, Feb. 14, 2005, 25:12-23). These two accidents were "quite serious." (Hescox Depo.,

1 Vol. 1, Feb. 14, 2005, 24:10-22). These explosions were both on the 160-Acre Property.
2 (Hescox Depo., Vol. 1, Feb. 14, 2005, 35:22-24).

3 One explosion was in February 1968 where an explosion destroyed Building 6,
4 damaged many other buildings and killed three people. (Exhibits P26 at PSI 3000241-245.)
5 The other was in May 1968, in which the 150-Gallon Mixer exploded killing two people.
6 Exhibit P20 shows where these massive explosions took place.

7 A number of buildings were damaged in the 1968 explosion. (Hescox Depo., Vol. 2,
8 Feb. 15, 2005, 323:1-3.) It occurred at closing, when Apollo employees were loading the
9 finished product out of the building and bringing tomorrow's pyrotechnic mix into the
10 building. It was such a catastrophe because it set off the maximum amount of pyrotechnic
11 mix that would be in the building at any time and propagated some debris into several
12 storage buildings. (Hescox Depo., Vol. 2, Feb. 15, 2005, 323:1 - 325:7.) Water was used
13 by the Fire Department to put out the fire caused by the explosion and there was water on
14 the ground when it was over. (Hescox Depo., Vol. 2, Feb. 15, 2005, 328:18 - 329:5.)

15 The second explosion in 1968 occurred in a press building where fireworks were
16 being manufactured. (Hescox Depo., Vol. 2, Feb. 15, 2005, 385:16 - 386:16.) After this
17 explosion occurred, the building was dismantled and the space was used to burn waste
18 products, when they had permission to burn. Apollo burned scrap cones, defective cones
19 and chemicals. Instead of taking scrap down to the burn pit, these were burned on a
20 concrete pad. (Hescox Depo., Vol. 2, Feb. 15, 2005, 386:9-25.)

21 After the explosions, Mr. Hescox was involved in rebuilding the fireworks
22 manufacturing plant. Almost every building in the plant had to be rebuilt. (Hescox Depo.,
23 Vol. 1, Feb. 14, 2005, 71:22 - 72:2.) Some of the buildings that had been there
24 disappeared and debris was blown two or three blocks away. (Hescox Depo., Vol. 2, Feb.
25 15, 2005, 329:6-17.) The 1968 explosions were caused by an accumulation of too many
26 chemicals in a small area. (Hescox Depo., Vol. 1, Feb. 14, 2005, 74:12-18.)

27 There was also a fire incident at Apollo on Christmas Eve in 1980. An individual
28 went in a storage building of the manufacturing plant and lit some unfinished fireworks. The

1 building burned but was not completely destroyed. The building eventually was taken
2 down. (Hescox Depo., Vol. 1, Feb. 14, 2005, 210:1 - 211:12.)

3 Other accidental fires during operations by Apollo at the site included a number of
4 fires in the mid 1970's and early 1980's. (Exhibit P26 at PSI 3000246-273.)

5 Apollo used burn pits on the southern portion of the 160-Acre Property for disposal of
6 its waste. Apollo also built the so-called eastern Burn Pit, which was built from a former
7 U.S. Department of Defense railroad revetment. The eastern burn pit was used from time
8 to time by Trojan Fireworks, a manufacturer of Class C consumer fireworks that operated in
9 the Bunker Area. Stuart Carlton, former Plant Manager at Trojan, testified that Apollo and
10 Trojan Fireworks used the Eastern Burn Pit. Trojan used it for the disposal of large (over
11 500 lbs.) quantities of pyrotechnic manufacturing wastes. Mr. Carlton described the area as
12 an unlined pit measuring approximately one hundred feet by twenty feet by twelve feet.
13 (Carlton Depo., Vol. 2, Dec. 13, 2005, 332:1-5.) Exhibit P17 (at PSI 3000144) and Exhibits
14 P19 and P20 show the layout of the Apollo operational areas, including its burn pits.

15 At some point, the AQMD would no longer allow Apollo to burn its waste, so Apollo
16 built the pond, now known as the McLaughlin Pit. (Hescox Depo., Vol. 1, Feb. 14, 2005,
17 114:4-16.) The pond was Apollo's solution to the AQMD's refusal to let it burn waste. It
18 was the only way Harry Hescox could conceive to deactivate the combinations of chemicals
19 they had in a powder dry form. He "didn't know what else to do with them." (Hescox Depo.,
20 Vol. 1, Feb. 14, 2005, 198:25 - 199:11.)

21 The McLaughlin Pit was installed in late 1971 or early 1972 by Apollo on real
22 property owned and operated by Apollo, some 8 years after before PSI was incorporated.
23 (Exhibit P32.) Apollo dumped waste material into the pond after it was built. (Hescox
24 Depo., Vol. 1, Feb. 14, 2005, 105:10-17.) Apollo applied to the Regional Board for a permit
25 to construct and operate a waste disposal pit for its manufacturing waste materials, which
26 included perchlorate. Apollo's plan was to flood continually the waste placed in the pit with
27 water to prevent explosions. (Exhibits P29 and P36.)

28 ///

1 On November 14, 1971, the Regional Board issued Waste Discharge Requirements,
2 Order 71-39, which authorized the construction and operation of the proposed Apollo waste
3 disposal pit which later became known as the McLaughlin Pit. Regional Board Order 71-39
4 expressly prohibited "all discharge of waste to surface waters, surface water drainage
5 courses or areas which would allow percolation of waste." Order 71-39 also required Apollo
6 to file quarterly monitoring reports which were to contain monthly daily averages of waste
7 flows to the pit, and records of the depth of the waste in the McLaughlin Pit; it also required
8 Apollo to obtain prior approval of the Executive Officer before disposing of wastes from the
9 McLaughlin Pit either on or off site. (Exhibit P31.) Thereafter, Apollo contracted with a
10 swimming pool contractor to construct the McLaughlin Pit. The McLaughlin Pit was
11 simply a 20' x 20' x 4' plastered gunite swimming pool that had a 12,000 gallon capacity.
12 (Exhibit P32.)

13 The Regional Board Staff advised Apollo that it was in violation of Order 71-39 on at
14 least four occasions between 1972 and 1977. (Exhibits P33, P34, P35 and P36.) The
15 Regional Board records reflect that Apollo failed to submit a number of monitoring reports
16 and, based on actual observations, had failed to maintain sufficient freeboard in the
17 McLaughlin Pit to prevent waste water overflow. (Exhibits P33 through P36.)

18 The Regional Board Order 71-39 was issued with the understanding that 150 gallons
19 of fireworks manufacturing waste would be discharged to the pit per day. (Exhibit P31.) By
20 December of 1977, however, Apollo reported to the Regional Board that its discharge of
21 fireworks manufacturing waste had increased to 3,000 gallons per day. (Exhibits P38 and
22 P39.) The Regional Board considered and adopted Order 78-96, which permitted Apollo to
23 discharge 3000 gallons of fireworks manufacturing waste to the McLaughlin Pit per day. It
24 also continued to prohibit the discharge of industrial wastes to the waters of the state:
25 "industrial wastes shall not be discharged or caused to be discharged, in a manner which
26 will allow the wastes to reach waters of the state." (Exhibit P40.)

27 Although complete records of the raw materials stored and used by Apollo on the
28 160-Acre Site have not been located, there is considerable evidence that Apollo used tens

1 of thousands of pounds per month of perchlorate. (Exhibits P44 and P65.) On September
2 21, 1979, Apollo purchased 21,000 pounds of potassium perchlorate from Kerr-McGee
3 Chemical Corp. The shipment of potassium perchlorate arrived in 70 drums. (Exhibit P44.)
4 Pedro Mergil, a long-time employee of Apollo, testified that receiving a delivery of 70 drums
5 of chemicals at Apollo was not unusually large. (Mergil Depo, May 2, 2005, Vol. 1, 29:10-
6 30:18.)

7 In 1985, Apollo reported to the Rialto Fire Department that it was using 25,000
8 pounds or more of potassium perchlorate per month in its fireworks manufacturing
9 operations. (Exhibit P65.) Apollo used more perchlorate by "orders of magnitude" than
10 PSI, Goodrich or West Coast Loading. (Holub Depo., Vol. 3, April 6, 2007, 785:1-13.)

11 During their depositions, neither Gerard Thibeault nor Kurt Berchtold could explain
12 where all the waste water went, given that in 1978 Apollo had reported and the Regional
13 Board Staff confirmed that 3,000 gallons of waste materials per day were being discharged
14 to the 12,000 gallon pond. (Thibeault Depo., Vol. 1, March 14, 2007, 138:7 - 139:3;
15 Berchtold Depo., March 8, 2007, 144:2 - 147:7; Exhibits P38 through P40.)

16 The Regional Board's records reveal, however, numerous repeated monitoring report
17 violations. The records also contain a number of reported Regional Board Staff
18 observations of violation of the freeboard requirement, including a 1983 report by Advocacy
19 Team member Mr. Berchtold, in which he reported that "[t]he evaporation pond had no
20 freeboard, and rainfall had caused a minor overflow (est. - 5 gallons)." (Exhibit P51.) Mr.
21 Berchtold sent a follow-up letter to Richard Doerr, the Safety Manager at Apollo. Mr.
22 Berchtold confirmed the overflow and even reminded Apollo of its waste discharge
23 requirements, but took no action. (Exhibit P54.) Remarkably, there was no discussion of
24 the fact that Apollo was discharging 3,000 gallons per day of fireworks manufacturing waste
25 to the 12,000 gallon capacity pond. Following this violation, Apollo had the McLaughlin Pit
26 pumped out by a liquid waste hauler and the contents transported to the BKK Landfill.
27 (Exhibit P52 and P53.) The Regional Board files on the McLaughlin Pit contain no record of
28

1 any enforcement action taken as a result of any of the numerous violations of the waste
2 discharge requirements. (Exhibit P27.)

3 On January 24, 1985, Regional Board Staff reported being advised by Pedro Mergil
4 that by mid-1983, the McLaughlin Pit had not been used for 18 months.⁶ (Exhibits P27 at
5 PSI 3000371 and P64 at 3000511.) On October 15, 2004, Ralph Apel, General Manger of
6 Apollo, sent a letter to the County stating that Apollo was in the process of removing all
7 hazardous waste from its property, that all liquid waste had been removed, but no one
8 would take the solid waste because it could be explosive. (Exhibit P63.)

9 On April 2, 1985, Apollo was notified by Advocacy Team member Robert Holub that
10 the then new Subchapter 15 regulations, promulgated by the State Water Board, imposed a
11 number of new requirements on the McLaughlin Pit, which was classified as a Class I
12 hazardous waste unit; those requirements included groundwater monitoring for perchlorate
13 and other chemicals. (Exhibit P68.) On April 26, 1985, Apollo responded, advising that the
14 pit was no longer in use. (Exhibit P73.) On June 27, 1985, there was a fire in the pit "used
15 by Apollo for dumping all types of waste", which spread to the surrounding area. The Rialto
16 Fire Department reported that it used 1,000 gallons of water to extinguish the fire. (Exhibit
17 P70.) The solid waste left in the McLaughlin Pit had auto-ignited. (Exhibit P71.)

18 On October 1, 1985 and October 8, 1986, the Regional Board Staff sent additional
19 letters to Apollo again stating that it needed to comply with the Subchapter 15 regulations,
20 promulgated by the State Water Board. One of the letters pointed out that the certification
21 of whether contamination existed had to be made by a registered civil engineer or
22 registered geologist. (Exhibits P73 and P81.)

23 More than a year of back-and-forth letters followed concerning the required steps
24 necessary to close the McLaughlin Pit. During this time, Apollo filed for bankruptcy
25 protection and advised the Regional Board Staff of this situation, but apparently the
26

27 ⁶As set forth above, this information comes from a January 24, 1985 Regional Board
28 inspection report for Apollo. Bruce Paine of the Regional Board Staff memorialized a
conversation with Pedro Mergil of Apollo. Mr. Paine recorded that Mr. Mergil said Apollo
had not used the pond for 18 months, approximately since June 1983.

1 Regional Board Staff took no action to protect the State's interests in the bankruptcy.
2 (Exhibit P82; Berchtold Depo., March 8, 2007, 233:17 - 237:3.) Then, on May 26, 1987,
3 Apollo sold its portion of the 160-Acre Site, which included the McLaughlin Pit, to Ken
4 Thompson, Inc. Pursuant to the purchase agreement, Ken Thompson, Inc. assumed
5 responsibility for closing the McLaughlin Pit and any necessary cleanup. (Exhibit P87.)
6 The Regional Board Staff was so advised as Staff recorded in its file notes:
7 Apollo no longer owns the concrete waste pit. They sold the property to
8 Western Precast Products, Inc. [owned by Ken Thompson]. Western Precast
9 Property assumed the investigation and cleanup . . . when they bought
10 property from Apollo. McLaughlin Enterprises has been retained by Western
11 Precast to do the investigation and cleanup.
12 (Exhibit P27 at PSI 3000288 and PSI 3000320.) The Regional Board's own files
13 demonstrate that the Regional Board Staff knew in 1987 that the new owner of the
14 McLaughlin Pit took responsibility for its clean up and closure from Apollo. (Exhibit P27.)
15 Despite this assumption of responsibility, the Regional Board Staff did not seek financial
16 assurances from either Ken Thompson, Inc., the purchaser of the McLaughlin Pit, or from
17 Apollo, the previous owner and operator, even though the Regional Board Staff was well
18 aware that the latter was in the process of going through bankruptcy, nor did it file a claim in
19 bankruptcy court.
20 On February 25, 1987, Ken Thompson, Inc. submitted an Environmental
21 Assessment Review to Rialto as part of its application for a permit to build a concrete pipe
22 manufacturing plant on the 160-Acre Property, in part, over the McLaughlin Pit. (Exhibit
23 P85.) Under "Health Hazards," the report states:
24 Parcel 11 contains an open pit formerly used as a disposal area for
25 fireworks-related wastes and other residual materials. The project applicant
26 will contract with a disposal firm to clean up and fill in the pit prior to
27 implementation of portions of this project. Cleanup activities will include
28 analysis of the pit's contents, burning of the residuals if possible or alternative

1 disposal of the material at a certified waste disposal site, testing for possible
2 groundwater contamination due to leeching, disposal of any remaining
3 residuals onsite following chemical decontamination, and filling and closure of
4 the pit. As such, the cleanup program will require permits, approvals and/or
5 supervision from Rialto Fire Department, the San Bernardino County
6 Department of Environmental Health Services, the South Coast Air Quality
7 Management District, the Santa Ana Regional Water Quality Control Board,
8 the California Department of Health Services, and possibly, the U.S.
9 Environmental Protection Agency.

10 (Emphasis added.)

11 The Ken Thompson, Inc. Environmental Assessment Review report continued in the
12 "Recommended Mitigation" section:

13 Prior to any grading, construction or installation of equipment on Parcel 11,
14 the applicant shall have completed a satisfactory cleanup program of the
15 fireworks residual pit on Parcel 11 and shall have certified the satisfactory
16 completion of that program in a report to the City Engineer. As part of that
17 cleanup program, the applicant shall obtain all necessary permits or approvals
18 from local, state and/or federal agencies as required.

19 (Emphasis added.)

20 The environmental assessor determined that the proposed Ken Thompson, Inc.
21 project could have significant effects on the environment, absent the required mitigation
22 measures. (Exhibit P85 at PSI 3000559.) Thereafter, Rialto issued a negative declaration
23 under CEQA requiring the cleanup program for the "fireworks disposal pit" as a mitigation
24 measure and that a report showing completion of the cleanup be submitted to the Rialto
25 City Engineer before any grading or construction take place. (Exhibit P86.) The CEQA
26 conditions on Ken Thompson, Inc.'s development at the 160-Acre Property were never and
27 are still not satisfied. Nevertheless, Rialto issued the permit to Ken Thompson, Inc. and it
28 graded the area, likely moving contaminated soil all over the place as well as utterly failing

1 to close and cleanup the pit in accordance with Subchapter 15. It is also clear Ken
2 Thompson, Inc. began grading operations in July 1987, well before any sampling or the
3 alleged "closure" of the McLaughlin Pit. (Exhibits P88.)⁷

4 Negotiations between Ken Thompson, Inc.'s representatives and the Regional Board
5 Staff resulted in the decision of the Regional Board Staff to require only two shallow soil
6 borings for just four heavy metals in order to determine whether any waste had leaked or
7 spilled from the pit during its 16 years of operation and reached the groundwater. (Exhibit
8 P92.) Then, on the day of the actual sampling, the drill bit broke while drilling the first
9 boring and before reaching the bottom of the planned sampling location and only one
10 sample was retrieved that arguably could have been below the McLaughlin Pit. The drill
11 point at the boring was approximately one to three inches below the McLaughlin Pit.
12 (McLaughlin Depo., Vol. 2, February 22, 2007, 405:17-19.) No other soil sampling was
13 required by the Regional Board Staff to try to confirm whether the McLaughlin Pit was
14 leaking. (Exhibits P94.)

15 Regional Board Staff did not request McLaughlin to do an investigation or analysis of
16 the different ingredients in fireworks compositions. (McLaughlin Depo., February 22, 2007,
17 Vol. 2, 235:19-21.) Regional Board Staff did not request McLaughlin to investigate the
18 metals that might be specific to fireworks. (McLaughlin Depo., February 22, 2007, Vol. 2,
19 237:5-8.) Mr. McLaughlin was familiar with potassium perchlorate and oxidizers.
20 (McLaughlin Depo., December 1, 2006, Vol. 1, 170:19-25). Mr. McLaughlin testified under
21 oath that if requested by the Regional Board Staff he could have tested for potassium
22 perchlorate in the soils at the time the McLaughlin Pit was closed. (McLaughlin Depo.,

23 ///

24 ///

25

26 ⁷Despite its failure to satisfy the mitigative measures required to comply with CEQA,
27 Ken Thompson, Inc. is no longer named as a defendant in Rialto's federal litigation. Rialto
28 inexplicably has given Ken Thompson, Inc. a free pass. Rialto initially sued Ken
Thompson, Inc. in its federal case. After an email from Ken Thompson, Inc. to Robert
Owen, City Attorney for Rialto, Rialto filed an amended complaint that no longer named
Ken Thompson, Inc. as a defendant. (Exhibits P114 and P116.)

1 December 1, 2006, Vol. 1, 171:1-3.) Regional Board Staff never requested or required that
2 McLaughlin sample for any oxidizers. (McLaughlin Depo., February 22, 2007, Vol. 2,
3 235:22-25.)

4 On December 4, 1987, Ken Thompson, Inc. burned over 54,000 pounds of Class I
5 hazardous waste which had accumulated in the McLaughlin Pit as one of the final steps in
6 the alleged "closure" of the McLaughlin Pit. Approval from the California Department of
7 Health Services, now the Department of Toxic Substances Control ("DTSC") was required.
8 (McLaughlin Depo., Vol. 1, December 6, 2006, 72:25 - 73: 8; 145:21 - 146:6.) DTSC
9 approval was never obtained. (McLaughlin Depo. Vol. 1, December 1, 2006, 159:2-6.)
10 Indeed, DTSC previously had rejected Mr. McLaughlin's proposal to treat the McLaughlin
11 Pit on-site. (McLaughlin Depo. Vol. 1, December 1, 2006, 148:11-12; 151:3-6.)

12 However, the Regional Board continued its involvement in the "closure" of the
13 McLaughlin Pit after DTSC rejected Mr. McLaughlin's proposal for on-site treatment.
14 (McLaughlin Depo., December 1, 2006, Vol. 1, 131:17-21.) The Regional Board Staff
15 agreed with the burning of the McLaughlin Pit, (McLaughlin Depo., February 22, 2007, Vol.
16 2, 294:14-20); and, independently approved the "closure." (McLaughlin Depo., February
17 22, 2007, Vol. 2, 294:6-9.)

18 The only permit obtained for this burn of 54,000 pounds of Class I hazardous waste
19 was issued by Rialto Fire Department, without the required endorsement by the AMQD and
20 in open disregard of DTCS requirements. Moreover, the permit did not allow for the burning
21 of 54,000 pounds of Class I hazardous waste and was limited to the burning of 50 pounds
22 of material. (Exhibit P103.) Nevertheless, with Dan Brown of the Regional Board Staff and
23 Rialto Fire Department present to observe this illegal step in the alleged closure, the
24 hazardous waste was burned in a very intense fire lasting over four hours. (Exhibit P105.)

25 On December 9, 1987, without any further comment or decision by the Regional
26 Board Staff, Ken Thompson, Inc.'s consultant, Mr. McLaughlin, who lacked the requisite
27 training and engineering certifications mandated by Subchapter 15, declared, and the
28 Regional Board Staff accepted, that the McLaughlin Pit had been "closed" and that the two

1 shallow samples taken proved that the pit had not leaked in 16 years. Despite
2 "considerable concern that the material in the pit had possibly contaminated the soil and/or
3 groundwater under the pit," Mr. McLaughlin concluded and the Regional Board Staff
4 concurred that "neither the soil nor groundwater have been contaminated" and "there has
5 been no leakage of material from the pit." (Exhibits P105 to P107.) All reporting and
6 freeboard violations and the legally mandated closure requirements of Subchapter 15
7 simply were ignored and the groundwater was never sampled. Thereafter, with Rialto's
8 approval, the McLaughlin Pit with ashes remaining was buried in place, and Ken
9 Thompson, Inc.'s facility was constructed on top. (Exhibit P103 at PSI 3000610.)

10 Prior to December 1987, 23 CCR § 2580(a) required all Class I hazardous waste
11 units to be closed in accordance with "the monitoring program requirements in Article 5 of
12 this subchapter, throughout the closure and post-closure maintenance period. The
13 post-closure maintenance period shall extend as long as the wastes pose a threat to water
14 quality." 23 CCR § 2597(d) provided that the "regional board shall approve . . . the water
15 quality aspects of closure and post-closure maintenance plans for Class I waste
16 management units." Article 5, 23 CCR § 2557(e), provided that, "[f]or Class I waste
17 management units, dischargers shall analyze samples from all monitoring points for all
18 constituents identified in Appendix III of this subchapter. Such analyses shall be performed
19 at least annually to determine whether additional hazardous waste constituents are present
20 in ground water." In 1987, Appendix III, Table B, to Subchapter 15, listed potassium
21 perchlorate as one of the toxic chemicals for which monitoring was required.

22 Subchapter 15 also required that closure be "under the direct supervision of a
23 registered civil engineer or a certified engineering geologist." (Section 2580(b).) (Exhibit
24 P.73.) Mr. McLaughlin, the consultant retained by Ken Thompson, Inc. was neither. Mr.
25 McLaughlin's formal training was in physics and he was not certified as any kind of
26 engineer. (McLaughlin Depo., December 1, 2006, Vol. 1, 26:14-27; 43:15-18.) It is beyond
27 dispute that the Regional Board Staff failed to enforce and Ken Thompson, Inc. failed to
28 comply with the mandatory requirements of Subchapter 15.

1 In 1991, Advocacy Team member Gerard Thibeault, who had been with the
2 Regional Board Staff since 1985 and was then its Executive Officer, recommended to the
3 Regional Board that the waste discharge requirements for the McLaughlin Pit be rescinded
4 without any further investigation or compliance with Subchapter 15. (Thibeault Depo., Vol.
5 2, March 16, 2007, 477:25 - 478:3; Exhibits P108 and P109.) On February 8, 1991, the
6 Regional Board rescinded the waste discharge requirements for the McLaughlin Pit without
7 ever testing for perchlorate or any other chemicals in the soil or groundwater, other than two
8 shallow soil samples for four heavy metals.

9 The McLaughlin Pit remained buried and forgotten by the Regional Board Staff until
10 April 2002, when a consultant hired by the San Bernardino County Water District (now West
11 Valley Water District) issued an investigative report prepared by GeoLogic on potential
12 historical sources of perchlorate in the Rialto/Colton Groundwater Basin. (Exhibit P129.)
13 The April 2002 GeoLogic report, submitted to the Regional Board Staff on April 17, 2002,
14 identified Apollo, a number of other fireworks manufacturers, and the McLaughlin Pit as
15 potentially one of the most significant sources of perchlorate releases which required further
16 investigation:

17 According to the MSDSs on file, RDF [defined in the report to include Apollo]
18 stored and used numerous firework and explosive materials, which contain
19 perchlorate salts. However, no records of soil or groundwater sampling, nor
20 records of air quality monitoring were found within HazMat Division files.

21 Within the files found at County HazMat, of particular concern is a report,
22 included in Appendix G, regarding a closed-in place concrete lined pit [the
23 McLaughlin Pit], which used to be filled with partially defective components of
24 munitions and fireworks. . . . Although the report states that no leaching of
25 contaminants from the pit to the underlying soils and groundwater occurred,
26 no evidence of that exists in the data contained in the files. The pit was
27 closed in place after residual materials were detonated within the pit in
28 December 1987 and backfilled with clean soil.

1 (Exhibit P129 at PSI 3000777.) Based on these findings, the April 2002 GeoLogic report
2 recommended "direct authoritative inquiries to Red Devil Fireworks . . . in order to obtain
3 more information about their almost 40-years [sic] of operations at the site." (Exhibit P129
4 at PSI 3000778.)

5 The perchlorate release disaster at Robertson's gravel washing operation and
6 unlined settling ponds also remained hidden by the Regional Board Staff. The April 2002
7 GeoLogic Report recommended, however, that the "[e]ntire area of the former Rialto
8 Ammunition Backup Storage Point (RABSP) be investigated," including the "Broco/Denova
9 sites." These areas included the bunkers over which the Regional Board Staff permitted the
10 County's tenant to place its gravel washing operation and settling ponds. Indeed, the April
11 2002 GeoLogic Report contained diagrams that identified the historical occupants of each
12 of the bunkers where the settling ponds were placed. (Exhibit P129 at PSI 3000779.)

13 On May 23, 2002, Senator Nell Soto wrote Gerard Thibeault asking a number of
14 direct questions concerning the lack of progress by the Regional Board Staff in its
15 investigation and cleanup of perchlorate in the Rialto/Colton Groundwater Basin. Senator
16 Soto's letter specifically referenced the April 2002 GeoLogic Report and asked, among
17 other questions: (1) what facilities is the Regional Board aware of as the result of its
18 investigation, other than Goodrich and Kwikset, that are possible sources of perchlorate in
19 the groundwater (Question 5); and (2), referencing the April 2002 GeoLogic report, "[w]hat
20 effort had been made by the RWQCB to correlate the operations of Red Devil Fireworks
21 and Broco/Denova to perchlorate contamination?" (Question 6.) (Exhibit P123.)

22 On June 6, 2002, Mr. Thibeault provided the following misleading response to
23 Senator Soto's Question 5:

24 We are not aware of any other facilities in the vicinity of the site that have
25 been identified as having used perchlorate, or that were subject to a related
26 regulatory enforcement action in the past. In addition, our investigation
27 concluded that Goodrich and Kwikset are the most likely sources of
28 perchlorate based on the time period they operated.

1 (Exhibit P125 at PSI 3000713.)

2 In response to Question 6, Mr. Thibeault wrote:

3 We have not yet pursued additional detailed investigations to correlate
4 operations at Red Devil and Broco/Denova to perchlorate contamination. This
5 is because the preliminary information we have indicates that these facilities
6 may not be likely sources. However, we will attempt to obtain additional
7 information on these sites. It appears that the assembly, storage and shipping
8 of fireworks, and not necessarily the manufacture of fireworks, which is the
9 type of activity that likely would have resulted in a release of perchlorate. We
10 have no evidence of disposal or use of perchlorate at the current Pyro
11 Spectacular facility. Based on our experience in this region, and the
12 information obtained from perchlorate groundwater investigations that have
13 been conducted outside of our region, it is apparent that solid rocket
14 propellant manufacture and research facilities have generally been the
15 primary sources of perchlorate found in groundwater.

16 (Exhibit P125 at PSI 3000714.)

17 Except for the sentence relating to PSI, these statements in Mr. Thibeault's letter to
18 Senator Soto were false. With regard to the County Release as a significant source of
19 perchlorate, which Mr. Thibeault and his staff completely omitted from their response to
20 Senator Soto, as noted above, in March and April 2001, more than a year before Mr.
21 Thibeault's June 6, 2002 letter, the County wrote Dixie Lass of the Regional Board Staff and
22 reported rising concentrations of perchlorate (250-270 ppb in January 2001) in a monitoring
23 well downgradient of Robertson's aggregate washing operations and settling ponds, and
24 urged prompt action. Nor did Mr. Thibeault mention the Regional Board Staff had approved
25 the settling ponds without liners, let alone, that in his opinion, Staff had negligently caused
26 this release.

27 With regard to the the Apollo Releases, Mr. Thibeault did not report to Senator Soto
28 that he, Mr. Berchtold, and Mr. Holub, all current members of the Advocacy Team, have

1 been aware for many years of Apollo's large-scale fireworks manufacturing operations on
2 the 160-Acre Property, the disposal of thousands of gallons of Class I hazardous wastes at
3 the McLaughlin Pit that contained perchlorate, and his and the Regional Board Staff's
4 decision not to compel closure under Subchapter 15 of the State Water Board's regulations.

5 On June 8, 2002, Gerard Thibeault, Kurt Berchtold, Robert Holub, Ann Sturdivant,
6 and Kamron Saremi, all members of the Advocacy Team, met with Senator Soto and her
7 staff to discuss the progress of their investigation. On June 11, 2002 Mr. Thibeault wrote a
8 detailed e-mail to the members of the Regional Board summarizing his meeting with
9 Senator Soto, who, Mr. Thibeault reported, started the conversation by threatening to get
10 him fired:

11 The Senator said that she was thinking of going to the Governor and ask why
12 he had me working for the Board, since I obviously didn't know what I was
13 doing. She said that she was going to get to the bottom of this matter, and if
14 necessary, she would hold Senate hearings.

15 (Exhibit P126.) Mr. Thibeault confirmed at his deposition that he felt threatened by the
16 Senator's comments. (Thibeault Depo., Vol. 1, March 14, 2007, 191:3-21.)

17 In his e-mail to the members of the Regional Board, Mr. Thibeault attempted to
18 deflect attention from the evidence regarding the McLaughlin Pit in the April 2002 GeoLogic
19 report, which, if examined, would lead directly back to staff negligence. He wrote:

20 [It] added very little to what [staff] already knew of responsible parties. . . [and
21 that while] . . . [t]here have been a number of fireworks manufacturers at the
22 site since Goodrich left, but information to date indicates that these were just
23 fireworks assembly companies, and that no actualy [sic] manufacturing took
24 place where perchlorate-containing liquids would have been present.

25 (Exhibit P126 at PSI 3000757.) This statement is false.

26 If the Regional Board Staff already knew and remembered Mr. Berchtold's and Mr. Holub's
27 inspection and enforcement work at Apollo, then they also knew before the letter was
28 written to Senator Seto that Apollo was the largest manufacturer in the 1970s and 1980s of

1 fireworks in the United States, and that Mr. Thibeault had recommended rescission of
2 Apollo's waste discharge requirements without any compliance with Subchapter 15
3 whatsoever.

4 The Subchapter 15 McLaughlin Pit closure remains unaddressed. There is no
5 record of the Advocacy Team ever having publicly advised members of the Regional Board
6 of its negligent acts or omissions regarding the McLaughlin Pit. It is unknown whether the
7 Advocacy Team, in either its prosecutorial or advisory capacity, has ever so advised the
8 members of the Regional Board, the Office of Chief Counsel for the State Water Board, or
9 the members of the State Water Board in closed session or otherwise.

10 For reasons known only to the Regional Board Staff, Ken Thompson, Inc., who owns
11 the property where the McLaughlin Pit is located and who agreed in 1987 to close and
12 clean up any releases from the McLaughlin Pit, has never been required to do anything and
13 has never been the subject of a clean up and abatement order. In paragraph 7 of the
14 closing instructions to the property purchase, Ken Thompson, Inc. ("Buyer") agreed:

15 Buyer is aware that the subject property contains a fireworks residual pit of
16 hazardous material, and Buyer is in possession of a letter dated January 26,
17 1987 from McLaughlin Enterprises outlining an approach for the cleanup of
18 the fireworks residual pit. Buyer and Seller [Apollo] agree that seller shall
19 credit to Buyer by a reduction in Buyer's note created in this escrow the sum
20 of 29,800 in consideration of Buyer's full and complete release of all Seller's
21 responsibilities related to the fireworks residual pit.

22 (Exhibit P87 at PSI 3000565.) The Advocacy Team is well aware Ken Thompson, Inc. is
23 responsible for Apollo's use of the McLaughlin Pit, because it sent Ken Thompson, Inc. an
24 investigation order on February 6, 2004 based on Apollo's use. (Exhibit P112.) Documents
25 attached to the Advocacy Team's February 6, 2004 order make it clear that "Excerpts from
26 Pyrotronics 1985 Hazardous Materials Disclosure Form includes the use of 25,000+ pounds

27 ///

28 ///

1 per month of potassium perchlorate." Since issuing the investigation order in February
2 2004, nothing more has been required of Ken Thompson, Inc. by the Regional Board Staff.
3 (Exhibit P115.)

4 **C. Chilean Fertilizer**

5 Since at least 2004, the Advocacy Team has been aware that a possible source of
6 perchlorate in the Santa Ana region is from historical use of Chilean nitrate fertilizer. (Holub
7 Depo., Vol. 1, March 8, 2007, 126:14 - 127:4; Saremi Depo., Vol. 2, March 23, 2007, 538:3-
8 8.) Chilean nitrate fertilizer contains perchlorate in amounts of 0.2 percent or more.
9 (Exhibit P134.) Chilean nitrate fertilizer was used for many, many years in the Inland
10 Empire, particularly with respect to citrus. (Holub Depo., Vol. 2, April 4, 2007, 428:4-8.)
11 Lots of citrus was grown on farms in Rialto, dating back as far as the early 20th Century.
12 (Holub Depo., Vol. 2, April 4, 2007, 436:11-437:8.)

13 One way that the perchlorate and nitrate could leach out and get into the
14 groundwater is through the irrigation process. Farmers put fertilizer out on the ground when
15 the trees are growing. Then they introduce water irrigation to the area so that plants get
16 watered. The perchlorate, which is very soluble, leaches out of the fertilizer and goes
17 directly into the ground surface. Because of the constant irrigation, the water source
18 pushes the nitrate and perchlorate down. (Holub Depo., Vol. 2, April 4, 2007, 431:1-19.)
19 The other way perchlorate from Chilean fertilizer would reach groundwater, which would be
20 much more accelerated, would be through agricultural wells or other wells that have not
21 been properly abandoned during storm runoff. (Holub Depo., Vol. 2, April 4, 2007,
22 431:20-25.)

23 Low concentrations of perchlorate that are found in water wells in the Inland Empire
24 likely resulted from the historical use of Chilean fertilizer on the citrus groves in those areas.
25 (Holub Depo., Vol. 1, March 8, 2007, 128:19 - 129:3; 430:17-24.) It has been documented
26 through analytical testing done by U.S. EPA and others that Chilean fertilizer contained low
27 concentrations of perchlorate salts and Chilean fertilizer was used as a fertilizer on citrus
28 groves historically in the Inland Empire. (Holub Depo., Vol. 1, March 8, 2007, 128:4-9.)

1 The Advocacy Team admits that perchlorate concentrations below about 15 parts
2 per billion and more likely in the single-digit range are likely from Chilean fertilizer. (Holub
3 Depo., Vol. 1, March 8, 2007, 128:10-18, Vol. 2, April 4, 2007, 435:18 - 436:1.) Within the
4 Rialto-Colton basin, there are water supply wells in the lower Rialto basin that have low
5 concentrations of perchlorate that the Advocacy Team believes were caused by perchlorate
6 from Chilean fertilizer, not industrial sources. (Holub Depo., Vol. 1, March 8, 2007,
7 130:11-17.) These include City of Colton and West Valley Water District water wells in the
8 lower Rialto-Colton basin. (Holub Depo., Vol. 1, March 8, 2007, 130:24 - 131:12.)

9 The Advocacy Team recently performed its own isotope testing on certain wells in
10 the Chino Basin to analyze whether they are affected by industrial sources of perchlorate or
11 perchlorate from Chilean fertilizer. (Exhibit P 134.) Not surprisingly, the Advocacy Team
12 has not performed this testing on the water wells in the Rialto-Colton Basin allegedly
13 affected by perchlorate released from the 160-Acre Property. (Thibeault Depo., Vol.1,
14 March 14, 2007, 72:19 - 74:6.) Despite the fact Chilean nitrate fertilizer was used on farms
15 in Rialto for over 100 years, the Advocacy Team has made no investigation to determine
16 where the farms were located or how much Chilean nitrate fertilizer was used. (Holub
17 Depo., Vol. 2, April 4, 2007, 436:11-437:8.)

18 **D. Other Sources Of Perchlorate Ignored By The Advocacy Team**

19 The April 2002 GeoLogic report, submitted to the Regional Board Staff on April 17,
20 2002 (Exhibit P129), identified many other potential sources of potential perchlorate
21 contamination in the Rialto-Colton Basin. (Saremi Depo., Vol. 1, March 22, 2007,
22 120:10-19). Most of these have not been investigated by the Regional Board Staff to this
23 day. These potential source of perchlorate contamination are listed on pages
24 SAWB000422 through SAWB000446 of the April 2002 GeoLogic Report (Exhibit P129.)
25 Other than American Promotional Events, Broco and Trojan, the Advocacy Team still does
26 not know whether any of the companies listed on pages SAWB000422 through
27 SAWB000446 of the April 2002 GeoLogic audit (Exhibit P129), used or disposed of
28 perchlorate-containing wastes. (Holub Depo., Vol. 4, April 9, 2007, 930:16-24; Sturdivant

1 Depo., Vol. 3, March 29, 2007, 551:1 - 570:23; 582:4 - 587:9; Saremi Depo., Vol. 1, March
2 22, 2007, 156:4 - 211:24.) The Advocacy Team is aware that:

- 3 • APE handled perchlorate-containing wastes. (Sturdivant Depo., Vol. 3, March
4 29, 2007, 553:12-15.)
- 5 • Broco used or handled perchlorate-containing wastes at the site. Broco also
6 disposed of perchlorate-containing material onto the bare ground. (Sturdivant
7 Depo., Vol. 3, March 29, 2007, 560:6-11.)
- 8 • Trojan used, handled or stored perchlorate or perchlorate-containing wastes.
9 (Sturdivant Depo., Vol. 3, March 29, 2007, 586:17-24.) Trojan had
10 perchlorate-containing wastes and disposed of it onto the bare ground.
11 (Sturdivant Depo., Vol. 3, March 29, 2007, 587:10-15).

12 The April 2002 GeoLogic Report spends two full pages discussing Broco/Denova
13 Environmental. (Exhibit P129, SAWB000398-399.) The discussion includes the
14 \$2,494,318 fine and revocation of the company's authorization to accept and treat
15 hazardous waste. (Exhibit P129, SAWB000650-51.) According to Rialto's expert, the
16 maximum perchlorate concentration of 212,000 micrograms per kilogram (μ /kg) in soil was
17 found in the southeast corner of the 160-Acre Property at the Broco Pit, a backfilled
18 disposal Pit. (Declaration of Daniel B. Stephens, submitted by Rialto on April 12, 2007, p.
19 6.) According to deposition testimony from Advocacy Team member Ann Sturdivant,
20 Denova operated a facility northwest of the 160-Acre Property. (Sturdivant Depo., Vol. 3,
21 March 29, 2007, 471:15-20.) The DTSC was involved at the Denova site. (Sturdivant
22 Depo., Vol. 3, March 29, 2007, 472:25 - 473:4.) Munitions were exploded in sealed
23 containers, but Ann Sturdivant does not know whether Denova burned
24 perchlorate-containing waste. (Sturdivant Depo., Vol. 3, March 29, 2007, 473:17- 474:7.)
25 She does not know about the condition of the groundwater vertically below Denova.
26 (Sturdivant Depo., Vol. 3, March 29, 2007, 477:2-8.)
27 ///
28 ///

1 **VII. THERE IS NO BASIS FOR AN AWARD OF DAMAGES IN THIS PROCEEDING**

2 The Advocacy Team seeks recovery of its own costs and those incurred by Rialto,
3 Colton, and West Valley Water District to clean up the alleged contamination. (Draft CAO,
4 ¶ 73.) There cannot be a recovery of costs in this proceeding because the Advocacy Team
5 cannot prove the threshold requirement that PSI violated Water Code Section 13304(a). In
6 addition, the Advocacy Team's reliance on Water Code Section 13304(c) for its cost
7 recovery claims is legally misplaced. Water Code Section 13304(c) is clear on its face that
8 any cost recovery claims must be brought in a "civil action." A civil action takes place in a
9 court. (Code of Civil Procedure Sections 22, 24 and 30.) This proceeding is not a "civil
10 action" as required by Water Code Section 13304(c) for cost recovery claims. Accordingly,
11 no award of clean up costs against PSI is permitted.

12 **VIII. THERE IS NO BASIS FOR FURTHER INVESTIGATION BY PSI**

13 The Draft CAO seeks an order under Water Code Section 13267 for additional
14 investigation of soil and groundwater at the and downgradient of the 160-Acre Property to
15 further delineate sources of perchlorate and TCE and the downgradient extent of the plume
16 of perchlorate and TCE. There is no basis to order PSI to perform additional investigation.

17 First, it is undisputed that PSI never used TCE. Thus, there is no basis for requiring
18 PSI to investigate sources of TCE or the extent of the TCE plume.

19 Second, all soil samples from PSI's operational areas on its leasehold on the 160-
20 Acre Property have been non-detect for perchlorate. (Exhibit P10.) Based on the data,
21 Gerard Thibeault sent PSI a letter on March 5, 2005 stating that no additional soil samples
22 were required at PSI's facility. (Exhibit P12.) No basis has been given by Regional Board
23 staff to change this position.

24 Third, Advocacy Team member Gerard Thibeault testified that if convincing evidence
25 was provided that a suspected discharger had not "discharged or was not threatening to
26 discharge in such a way that groundwater is, has been, or might be affected, then they
27 wouldn't have to – it's my understanding they wouldn't have to proceed any further."
28 (Thibeault Depo., Vol. 1, March 14, 2007, 208:15-209:9.) The evidence submitted by PSI

1 and the total lack of evidence submitted by the Advocacy Team establish that PSI has not
2 discharged perchlorate to groundwater or in a manner that threatens groundwater.
3 Accordingly, there should be no further investigation orders against PSI in connection with
4 the 160-Acre Property. The Advocacy Team admits that a number of parties operated at
5 the 160-Acre Property, including PSI, and they have not made an attempt and it probably is
6 not technically possible to differentiate which perchlorate from which party or how much
7 perchlorate from each party got to groundwater. (Holub Depo., Vol. 1, March 8, 2007,
8 184:4-20.)

9 **IX. PSI'S INABILITY TO PAY FOR COMPLIANCE WITH THE DRAFT CAO OR**
10 **FUTURE INVESTIGATION**

11 Rialto has estimated that cleanup of the 160-Acre Property potentially could cost
12 hundreds of millions of dollars. (Holub Depo., Vol. 3, April 6, 2007, 248:23 - 249:2.) Even
13 installing one monitoring well is well over \$100,000. (Sturdivant Depo., Vol. 1, March 20,
14 2007, 42:4-22.)

15 Pursuant to Cal. Admin Code tit. 23, section 2907, 23 CA ADC § 2907, an alleged
16 discharger's resources should be taken into account in determining schedules for
17 investigation and cleanup and abatement. PSI does not have the financial resources to
18 comply with the Draft CAO sought by the Advocacy Team. PSI's evidence of its lack of
19 financial resources is submitted in the Declaration of Cheryl A. Samperio. (PSI 2001802-
20 04.) In the event the Draft CAO becomes final or additional investigation is required by PSI,
21 PSI requests that its lack of financial resources be taken into consideration.

22 **X. RESERVATION OF RIGHTS**

23 This proceeding violates PSI's right to due process for the reasons previously set
24 forth in each of the motions, objections and letters that were submitted to the Hearing
25 Officer by PSI, Goodrich and the Emhart Parties. PSI incorporates all of the motions,
26 objections and letters submitted to the Hearing Officer by PSI, Goodrich or the Emhart
27 Parties as though fully set forth in this brief. PSI reserves all of its rights to challenge the
28 legality of this proceeding in any court of competent jurisdiction, and intends to do so, if


1 necessary, at the appropriate time. PSI's participation in this hearing is not a waiver of its
2 legal rights and remedies.

3 **XI. PSI'S INCORPORATION OF OTHER SUBMISSIONS**

4 PSI incorporates the submissions of Goodrich and the Emhart Parties, unless
5 otherwise indicated by PSI. PSI does not incorporate the submissions of Goodrich and the
6 Emhart Parties addressing application of Water Code Section 13304(j) or the Emhart
7 Parties' submissions on "successor liability issues."

8 DATED: April 16, 2007

RESOLUTION LAW GROUP, P.C.

9
10 By: 
11 Philip C. Hunsucker
12 Brian L. Zagon
13 Attorneys for Designated Party
14 Pyro Spectaculars, Inc.
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On **April 17, 2007**, following ordinary business practice, I served the foregoing documents described as:

On the following Person(s):

<u>State Water Board</u> (via Hand-Delivery)	<u>Rialto</u> (via Hand-Delivery)
Karen O'Haire	Scott A. Sommer, Esq.
Senior Staff Counsel	Pillsbury Winthrop Shaw Pittman LLP
Water Resources Control Board	50 Fremont Street
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Sacramento, CA 95814	

X (FEDERAL EXPRESS BY OVERNIGHT MAIL) I caused such envelopes to be delivered to an overnight service with delivery fees provided for, addressed to the person(s) whom it is to be served.

27

28

X (BY EMAIL) by transmitting via facsimile the document listed above to the fax number(s) set forth above, or as stated on the attached service list, on this date.

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Robert D. Wyatt, Esq.
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I declare that I am employed in the office of a member of the bar of the State of California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **April 17, 2007** at Lafayette, California.

Marie Montoya